88-1989

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

RONALD CALDEIRA, Petitioner

v.

COUNTY OF KAUAI;
HAWAII GOVERNMENT EMPLOYEES ASSOCIATION,

AFSCME LOCAL 152, AFL-CIO, et al., Respondents

ON CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI

APPENDICES

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Issues Presented

1. Whether the order of a state judge, which is transformed into a judgment by state statute, confirming an arbitration award which sustained petitioner's discharge from public employment, is preclusive under the Full Faith and Credit Statute, 28 U.S.C. §1738, of Petitioner's §1983 action in federal court against respondent County and its officials when:

(a) The order was obtained on summary proceedings;

(b) the state judge had no power to review the arbitration award for legal error or for factual error under either the clearly erroneous or substantial evidence standard, or even for

arbitrariness, but was mandated by state statute to confirm the award upon its filing in court together with a copy of the collective bargaining agreement?

(c) the state judge lacked jurisdiction to adjudicate a §1983 claim and had no power give petitiioner compensatory damages, punitive damages, damages for emotional distress, or attorney's fees, which were available to himi under §1983;

2. Whether the confirmation hearing before the state judge was full and fair, and whether there were reasons to question the quality, extensiveness, or fairness of such hearing, when the motion to confirm was filed a year-and-a-half after the time

permitted by state statute and:

(a) Petitioner did not have adequate notice of the hearing setting forth the grounds for late and untimely filing of such motion;

(b) Petitioner was denied a continuance of the hearing to meet such grounds as stated for the first time in oral argument at the hearing;

(c) Petitioner could not engage in discovery;

(d) Petitioner had no opportunity for hearing in that

(1) Petitioner could not put on the proof on which he relied in his §1983 action;

(2) Petitioner could not cross-examine witnesses;

(e) the state court lacked subject matter jurisdiction and power to grant §1983 relief;

(f) there was reason to question the impartiality of the state judge, who made arbitrary and capricious decisions in failing to grant pettioner a continuance and in failing to recognize that the motion to confirm was untimely;

(g) the state judge made no findings of fact or conclusions of law and did not articulate the reasons for his decision in any manner;

(h) there was no right of appeal from the order of confirmation.

3. Whether petitioner's claim in arbitration, and claim before the state judge on confirmation hearing were the

"same claim" raising the "same issue" as Petitioner's §1983 action, so as to be entitled to claim and issue preclusive effect when

(a) Petitioner relied on different evidence--namely, a conspiracy among and between respondent County and Union officials--which was not presented to the Arbitrator and could not be entertained by the state judge;

(b) Neither the arbitrator nor the state judge had jurisdiction to decide a §1983 claim or power to grant §1983 relief; and petitioner was unable to raise §1983 issues either with the arbitrator or the state judge;

(c) Neither had expertise in the

constitutional law pertaining to §1983;

(d) the Union and County officials were sued, in the §1983 action, in both their representative and individual capacites, whereas the arbitration and confirmation hearing involved only the County and Union as entities;

(d) Petitioner's §1983 claim depends on a federal source of right.

4. Whether the state confirmation order was "on the merits" when the state court judge could not review the arbitration award even for arbitrariness but was mandated by statute to confirm the award upon its presentation together with the collective bargaining agreement.

5. Whether the Ninth Circuit

failed to correctly determine and apply Hawaii preclusion law which exempts a plaintiff from the res judicata effects of a judgment if at the time of the first suit he is ignorant of the rights which he later asserts in the second suit.

6. Whether Caldeira's §1983 claim is covered by federal common law or other exceptions to preclusion applicable to protect federal interests or when a defendant's conduct should estop him from relying on preclusion.

7. Whether, notwithstanding any failure of Petitioner's §1985(3) conspiracy claim against the Union and its officials for lack of class based animus, the Ninth Circuit failed to hold that they have liability both under state of joint liability and directly under §1983.

8. Whether the decision of the Hawaii Labor Relations Board, formerly the Hawaii Public Employee Relations Board, that certain of Petitioner's unfair labor practices were time-barred but that in any event the aforesaid state court confirmation order was preclusive, can be said to be "on the merits" for purposes of determining its res judicata effect.

List of Defendants

1. COUNTY OF KAUAI

2. EDUARDO E. MALAPIT, individually

3. EDUARDO E. MALAPIT, in his representative capacity as former Mayor of the County of Kauai

4. TONY T. KUNIMURA, individually

5. TONY T. KUNIMURA, in his representative capacity as Mayor of the County of Kauai

6. HENRY MORITA, individually

7. HENRY MORITA, in his representative capacity as former County Engineer, Department of Public Works, County of Kauai

8. LAWRENCE KITAMURA, individually

9. LAWRENCE KITAMURA, in his representative capacity as County Engineer, Department of Public Works, County of Kauai

10. GORDON H. SHIBAO, individually

11. GORDON H. SHIBAO, in his representative capacity as Superintendent of Parks and Recreation, Department of Public Works, County of Kauai

12. WILSON MIYASHIRO, individually

13. WILSON MIYASHIRO, in his representative capacity as Director of Recreation, Department of Public

Works, County of Kauai

14. ISAAC HOOKANO, individually

15. ISAAC HOOKANO, in his representative capacity as former Supervising Lifeguard, Parks and Recreation, Department of Public Works, County of Kauai

16. PHILLIP KEKAHU, individually

17. PHILLIP KEKAHU, in his representative capacity as lifeguard, Parks and Recreation, Department of Public Works, County of Kauai

18. SID KINI, individually

19. SID KINI, in his representative capacity as lifeguard, Parks and Recreation, Department of Public Works, County of Kauai

20. HAWAII GOVERNMENT EMPLOYEES' ASSOCIATION, a labor union

21. CLARENCE M. ("GADGET") TAKASHIMA, individually

22. CLARENCE M. ("GADGET") TAKASHIMA, in his former representative capacity as Kauai Division Chief of HGEA

23. JESSIE K. MANLAPIT, individually

24. JESSIE K. MANLAPIT, in his representative capacity as former Kauai Division Chief of HGEA

25. RAY S. EMURA, individually

26. RAY S. EMURA, in his representative capacity as Acting Kauai Division Chief and Kauai Division Chief of HGEA

27. RUSSELL OKATA, individually

28. RUSSELL OKATA, in his representative capacity as former Executive Director of HGEA

29. JOHN E. K. AKANA, individually

30. JOHN E. K. AKANA, in his representative capacity as Deputy Executive Director of HGEA

31. DAVIS K. YOGI, individually

32. DAVIS K. YOGI, in his representative capacity as Contracts Specialist, HGEA

33. CHARLES KUNITAKE, individually

34. CHARLES KUNITAKE, in his representative capacity as Contracts Officer of HGEA

35. MELVIN HIGA, individually

36. MELVIN HIGA, in his representative capacity as Executive Assistant of HGEA

37. DOES 1 to 20, inclusive.

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Opinions Below

The opinions of the District Court for the District of Hawaii are unreported but are attached as Appendices F and H. The opinion of the Court of Appeals for the Ninth Circuit is reported at 866 F. 2d 1175 (9th Cir. 1989, Docket No. 87-2959). It is also contained in Appendix B.

Jurisdiction

The Ninth Circuit judgment was rendered, filed and entered on February 2, 1989. No petition for rehearing was filed. On April 24, 1989, this Court granted petitioner to and including June 2, 1989, in which to file this petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes Involved
[quoted in Appendix A]

U.S. CONST., ART. IV, § 1; 28 U.S.C. §1738; CIVIL RIGHTS ACT, 42 U.S.C. §§1983 and 1985(3); HAW. REV. STAT., Chapter 658, §§658-6, 7, 8, 9, 10, 11, 12, 13,14, and 15.

Statement of the Case

A. SUBSTANTIVE FACTS.

Petitioner Ronald Caldeira ("Caldeira") was hired in 1978 by Respondent County of Kauai ("the County") in its Department of Public Works as a life-

guard at the County's Kapaa pool on the Island of Kauai. Caldeira held this job and job classification for some five years, until October 11, 1983, when he was discharged [CR 69 p.101].[1/]

Commencing in the first year of Caldeira's employment, there developed between respondent County officials a conspiracy to effect Caldeira's discharge by the County when no good cause existed for discharge[2/]. Pursuant to this conspiracy, as Caldeira later alleged in his Civil Rights Act complaint, respondent County officials refused to furnish Caldeira tools, materials, and supplies which he needed to maintain the Kapaa Pool; disciplined him for its resultant poor condition; and thereby built up the appearance of progressively severe disciplinary sanctions based on false charges so as to make out a case of good cause for discharge [complaint ¶ 7].

Caldeira further alleged in his complaint that soon after inception of the conspiracy, respondent officials of respondent Hawaii Government Employees Association ("the Union") knowingly joined in it by refusing to investigate disciplinary penalties imposed on Caldeira, refusing to investigate his grievances, and refusing to process such grievances [complaint ¶ 24]. There were 12 distinct phases or episodes of the conspiracy [see n.2 supra].

EPISODE 1 (November 1978-October 1979) [APP. M pp. 3-10]: Caldeira's supervisor, respondent Isaac Hookano ("Hookano") signed a letter to Caldeira forging the names of other lifeguards, criticizing Caldeira's work, and insulting his genitals; and Hookano and his supervisor, respondent Wilson Miyashiro ("Miyashiro"), Director of Recreation for the County's Public Works Department, began a series of written reprimands to Caldeira for the pool's poor condition and maintenance while at the same time failing to keep Caldeira stocked with the supplies and equipment needed to do so.

EPISODE 2 (January-May 1980) [APP. M pp. 10-11]: Miyashiro and his supervisor, respondent Gordon H. Shibao ("Shibao"),

Superintendent of Parks and Recreation for the County's Public Works Department, tried to get Caldeira discharged by having the Red Cross test his life saving skills, hoping he would fail the test. The scheme backfired when Caldeira passed the test.

EPISODE 3 (June 1980) [APP. M pp. 1114]: Hookano, Miyashiro, and Shibao got respondent Henry Morita ("Morita"), then County Engineer (head of the Department of Public Works), to suspend Caldeira for two days because he had not turned in his time sheets on the day marking the end of the pay period, although he had three days thereafter to do so The Union knew but did not grieve.

EPISODE 4 (June-July 1980) [APP. M pp. 14-19]: Hookano, Miyashiro, and Shibao recommended to Morita that he suspend Caldeira for 5 days for leaving work without authorization when Caldeira, complying with a change in his work schedule, left work an hour earlier than usual but did not sign a change form. When Caldeira asked his Union representative, respondent Clarence ("Gadget") Takashima ("Takashima"), to grieve, Takashima laughed and told Caldeira: "I am going to sit back and laugh when you get fired."

EPISODE 5 (January 1989) [APP. M p. 20]: the County gave Caldeira an unsatisfactory annual Job Performance Rating ("JPR"); and Miyashiro recommended a five-day suspension which the Union refused to grieve.

EPISODE 6 (May-September 1981) [APP. M pp. 21-33]: Miyashiro accused Caldeira of "sabotaging" the pool at a time when

Ronald was on a month's sick leave; and Morita imposed a 10 day suspension, threatening dismissal. The Union grieved only after Caldeira filed an internal Union appeal; agreed with respondent Mayor Eduardo Malapit ("Malapit") to a 5 day suspension, deferred for one year as long as Caldeira maintained a "satisfactory" JPR; and then refused to arbitrate, Takashima, telling County officials privately that Ronald had "no gri vance," was "on his own," and should be denied further hearings.

EPISODE 7 (October-November 1981) [APP M pp. 34-37]: Miyashiro accused Ronald of "incompetence" for causing particles in the pool requiring repair of the filtration system. Ronald's grievance over these charges [410] was "resolved whereby no such accusation [of incompetence] was made" [429]; but no County retraction ever issued.

EPISODE 8 (November-December 1981) [APP. M pp. 37-45]: Takashima refused to investigate and would not grieve or arbitrate when Morita suspended Caldeira for 20 days for allegedly failing to notice that a four-year-boy had "almost drowned" at the pool. Caldeira filed an unfair labor practice complaint with the Hawaii Public Relations Board ("HPERB"), which after full evidentiary hearing issued a published decision, Caldeira v. Malapit, et al., Case Nos. CE-03-80 and CU-03-45, decision no. 196, 3 HPERB 523 (1984) [CR 70, Ex. A], ruling both that the Union had abandoned Caldeira and that the County had improperly refused his grievance.

EPISODE 9 (July 1982) [APP. M pp. 46-48]: the County gave Caldeira a "not quite satisfactory" JPR; and Morita imposed the deferred 5 day suspension.

Following a Step 1 meeting, respondent Union agent Ray Emura ("Emura") told Caldeira that the Union would not grieve further and would accept the suspension.

EPISODE 10 (March 1983) [APP. M pp. 48-54]: a new lifeguard assigned to Kapaa Pool, respondent Philip Kekahu ("Kekahu"), was given the manual for new pumps being installed in the pool, whereas Caldeira was not. Caldeira grieved to respondent Jesse Manlapit ("Manlapit"),[3/] the Union's new Kauai division chief (Takashima having retired). After some vacillating, Manlapit told the County that he was "dropping this grievance".

EPISODE 11 (September-October 1983) [APP. M pp. 54-58]: Miyashiro suspended Caldeira for 3 days for failing to carry out orders to perform the menial work of cleaning the pool's toilets, bathrooms, and shower stalls and pulling weeds. Emura refused to grieve this demotion of Caldeira to yardman. Then new County Engineer, respondent Lawrence Kitamura ("Kitamura"), at the urging of Miyashiro and Shibao, discharged Caldeira for failing to carry out these orders as well as for failing to carry out Kitamura's personal order to cut the lawn around the pool with a "cut cane knife" (a machete-like knife (the County would not furnish Caldeira with a lawnmower) with which Caldeira then cut himself, trying to comply. Emura had also refused to grieve this order; but after Caldeira's internal Union appeal the Union did take the 3-day suspension and discharge to arbitration.

EPISODE 12 (January 1985) [APP. M pp. 58-65]: in arbitration before arbitrator Stanley Ling, Esq. [see Arbitration Trans-

cript (CR 67 (Ex. A)], the Union's attorney, Charles Khim, in exclusive control of the arbitration on Caldeira's behalf, refused Caldeira's request to use some of the conspiracy evidence (Caldeira later filed his second complaint with HPERB over this refusal [CR 60 Ex. B]), never made any argument that because of the conspiracy, Caldeira was entitled to resist his demotion and the "cut-cane knife" order, put on no evidence of Episodes 1 through 10, did not mention the Civil Rights Act, and limited the defense of Caldeira to showing only that he had tried, despite his injury, to perform the various orders. With only Episode 11 before him, Arbitrator Ling issued a written decision on January 15, 1985, sustaining the discharge [APP C].

Thereafter Caldeira, on April 8, 1985, filed his second unfair labor practice complaint with HPERB [CR 60 (Ex. B)]. A few months later, on July 16, 1985, Caldeira also filed his Civil Rights Act complaint in the District Court for the District of Hawaii, which had federal question jurisdiction under 28 U.S.C. § 1331. Caldeira sought damages under 42 U.S.C. §1983 [APP. A p. ii; Complaint ¶10], which protected him, as a tenured civil servant with both a property and liberty interest

in his job, from state action which had taken away his job, and thereby deprived him of his constitutional rights [Complaint ¶¶ 10, 11, 12, and 13]. The Union and its officials were joined as co-conspirators under 42 U.S.C. §1985(3) [APP.A p. v; Complaint ¶¶ 21, 26].

B. PROCEDURAL FACTS.

Two years later, with jury trial set to commence in October 1897 before the Honorable Harold W. Fong, United States District Judge, the Union moved for summary judgment (the County joined in the motion) [CR 58, 60] on the ground inter alia that the arbitration award was res judicata, precluding Caldeira's federal Civil Rights action [CR 58 (Memorandum, p. 5].

Caldeira's opposition memorandum noted that the County had not moved in state court for judicial confirmation of the ar-

bitration award as provided in HAW. REV.

STAT. §658-8 [APP. B p. xiv-xv] and argued that under McDonald v. City of West Branch, 466 U.S. 284 (1984) the award was not preclusive [CT 65, pp. 9-10].

The Union and the County then took themselves to state court on Kauai (Hawaii's Fifth Circuit Court); and on September 15, 1987, the County filed a motion for confirmation of the arbitration award [CR 76 (Ex. A)] under HAW. REV. STAT. §658-8. The Union joined with the County in this motion, APP. D (Transcript of Hearing) p.7;

The County's motion was a year and one half too late, as HAW. REV. STAT. §658-8 required that a motion for confirmation be brought "...within one year after the award is made...." Caldeira therefore opposed confirmation on the ground that the motion was time-barred [CR 77 (Ex. A], stating to Hawaii Fifth Circuit Judge Kei Hirano that such

untimely action by the County should not "serve to derail Caldeira's civil rights trial two weeks from now." [Id., p. 8].

During oral argument lasting approximately 20 minutes [APP D], both the County and the Union argued to Judge Hirano, for the first time, that the one year statute of limitations was tolled by the pendency of Caldeira's administrative claim before HPERB [CR 77 (Ex. B, pp.4-8)], citing purported case law [APP. D pp.6, 7-8]. Caldeira, surprised by this claim, requested time to brief the cases cited by the County and the Union [Id., p. 9]. Judge Hirano did not grant Caldeira's request, agreed with the County that the one-year period had been tolled, and granted the motion to cinfirm [Id., p. 10]. On September 25, 1987, the same day as oral argument, a formal written order confirming the arbitration award was entered. [APP. E][4/]

In federal court the following Monday, on September 28, 1987, for hearing on the Union's summary judgment motion, the Union and the County filed a copy of Judge Hirano's September 25 order of confirmation. Judge Fong took the motion under advisement [Tr. p. 58].

On October 5, 1987, with the federal motion still under advisement, Caldeira moved Judge Hirano in state court for reconsideration [CR 80 (Ex. A)], briefing the tolling issue.[5/]. At the same time as Caldeira moved for reconsideration, he also filed a motion to vacate the arbitration award, placing before Judge Hirano the same evidentiary record as in federal court [CR 80, Ex. A (Aff. of Robert A. Smith, ¶¶ 2, 3].

On October 9, 1987, four days later, Judge Fong in federal court rendered his decision granting the Union's and County's motion for summary judgment

[APP. F][6/].

On October 14, 1987, Caldeira filed a supplemental memorandum with Judge Hirano, attaching a copy of Judge Fong's decision [CR 80 (Ex. D)]. Caldeira further informed Judge Hirano that the HPERB proceeding had been dormant for over two years without any hearings on the merits [Id., Ex. D (Aff. of Robert A. Smith, ¶ 2)]. Notwithstanding these arguments, Judge Hirano on October 15, 1987, after a telephone conference hearing of approximately 25 minutes [APP G (transcript of hearing)] denied Caldeira's motion for reconsideration and the motion to vaate, stating: "...when looking at all of the submittals, your motion is going to be denied [APP. G p. 21]. Judge Hirano gave no further articulation for his decision, either at the time or later, in formal written order of denial [APP. H].

Caldeira did not appeal Judge Hirano's confirmation order because under the parties' collective bargaining agreement[7/] as enforced by HAW. REV. STAT. §658-15,[8/] that order was not appealable. Caldeira therefore turned his attention to Judge Fong's decision in federal court. After judgment was entered thereon dismissing Caldeira's action on October 13, 1987 [APP. I]72]. Caldeira moved for reconsideration [CR 80]. Judge Fong denied the motion on October 26, 1987 [APP J]; and Caldeira timely appealed to the Ninth Circuit on November 6, 1987 [CR 84; ER 81]. The Ninth Circuit had jurisdiction under 28 U.S.C. § 1294.

Having timely appealed Judge Fong's decision, Caldeira then, on December 26, 1987, filed a Petition for Writ of Mandamus in the Hawaii Supreme Court, [ER 83-108]. On January 5, 1988, Caldeira's

petition for writ was dismissed [ER 109]. Meanwhile, the County, on December 16, 1987, had filed an argument with HPERB contending that Caldeira was "mistaken" in his belief that Judge Hirano's order was not appealable and should have taken the appeal [ER 115], Caldeira then filed an untimely (by 9 days) appeal [ER 110], arguing that the County, by virtue of its argument, was estopped to deny appealability and challenge timeliness. The Hawaii Supreme Court dismissed the appeal as untimely on March 24, 1988 [ER 112].

Seventeen days before oral argument on Caldeira's appeal to the Ninth Circuit, HPERB, on November 1, 1988, decided Caldeira's second unfair labor practice complaint [APP. K], ruling that episodes 1-10 were timed-barred [Id., p.20] but that in any event, HPERB was precluded by Judge Fong's and Judge

Hirano's decisions from considering any of the 12 episodes [Id., p. 37-38]

The Ninth Circuit, after oral argument, was advised of this decision and sent a copy by joint letter from all counsel in the case [APP L]. Thereafter, on February 2, 1989, the Ninth Circuit rendered its decision herein.

Argument

A. BACKGROUND.

As both a Hawaii state court and a Hawaii state administrative agency have ruled on certain aspects of Caldeira's claims against the Union and the County arising out of his discharge, the case requires consideration of this Court's numerous preclusion decisions.[9/] Although no one decision has purported to limit or overrule any other, it may be noted that they are frequently inconsisent, even to the point of proceeding from "...two diametrically

inconsistent visions of the legislative history of section 1983."[10/]

In one such vision, §1983 was enacted precisely because state officials and courts could not be trusted to enforce federal interests, Haring v. Prosise, 462 U.S. 306, 323 (1983); Allen v. McCurry, 449 U.S. 90, 98-99 (1980); and the federal courts were therefore to "interpose" themselves as "guarantors" of the constitutional rights of the people, McDonald, 466 U.S. at 290, quoting from Mitchum v. Foster, 407 U.S. 225, 242 (1972), citing inter alia Monroe v. Pape, 365 U.S. 167 (1961).

In the other vision, the Court notes that "[m]uch has changed" since the Reconstruction Era Civil Rights Acts were passed, Pulliam v. Allen, 466 U.S. 522, 541 (1984), and exalts the interests of "comity" and "Our Federalism," expressing confidence in the ability of the state

courts to protect federal as well as local interests.[11]/

Under this Court's decision in Kremer v. Chemical Construction Corp., 456 U.S. 461, 474 (1982), it is settled that a litigant may have "...one full opportunity for a hearing on any issue, but because of limited resources, only one opportunity."[12]/ Yet this Court has also decided in McDonald and Gardner-Denver that in both Title VII and §1983 cases, "...an arbitration proceeding cannot provide an adequate substitute for a judicial trial [emphasis added]."[13]/

The precise holding of Kremer was that the Full Faith and Credit Statute, 28 U.S.C. § 1738 [APP A p. i] requires federal courts in section 1983 and Title VII lawsuits to give issue[14]/ preclusive effect to state court "final judgments on the merits."[15]/ In Migra v. Warren City School District Board. of Education, 465 U.S. 74 (1984),this Court

adopted claim preclusion as well [465 U.S. at 83]. In University of Tennesee v. Elliot, 478 U.S. 788, ___, 106 S.Ct. 3220, 3225 (1986), this Court extended rules of issue and claim preclusion to the decisions of state administrative agencies, to which §1738 has no application, in §1983 cases (although not in Title VII cases).

In these decisions, this Court has made a clear policy choice. As set forth in Migra, 465 U.S. at 84:

> ...it is more important to give full faith and credit to state court judgments than to ensure separate forums for federal and state claims. This reflects a variety of concerns, including notions of comity, the need to prevent vexatious litigation, and a desire to conserve judicial resources.

There are, however, major, qualifying limitations on preclusion. For in Kremer this Court also held that state proceedings, whether judicial or administrative, are neither claim nor issue preclusive

> ...when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate the claim or issue, Allen v. McCurry, 449 US at 95, 66 L Ed 2d 308, 101 S Ct 411; Montana v. United States, 440 US 145, 153, 59 L Ed 2d 210, 99 S Ct 970 (1979); Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 US 313,328-329, 28 L Ed 2d 788, 91 S Ct 1434 (1971). Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation. Montana v. United States, supra, at 164, n. 1, 59 L Ed 2d 219, 99 S Ct 970. Cf. Gibson v. Berryhill, 411 US 564, 32 L Ed 2d 488, 93 S Ct 1689 (1973). Kremer, 456 U.S. at 480-481 [Emphasis added][16] Compare United States v. Utah Mining and Construction Co., 384 U.S. 394, 421-422 [administrative res judicata requires "adequate opportunity to litigate"].

This Court in Kremer went on to equate "full and fair opportunity to litigate" with "...minimum procedural...Due Process...." [id., at 481]. But "full and fair" has not been further "defined";[16] and the present case provides opportunity for the Court to resolve many unanswered questions concerning the reach and scope

of preclusion in §1983 litigation.

B. CALDEIRA'S §1983 CLAIM AGAINST THE COUNTY AND ITS OFFICIALS WAS NOT PRECLUDED.

1. Caldeira Never Received "Full and Fair" Hearings; and Their "Quality, Extensiveness, and Fairness" May Be Doubted.

a. Administrative Res Judicata: The Arbitration.

Almost by definition, the arbitration hearing was not full, fair, or adequate because this Court has decided that arbitration is not an "adequate substitute" for a trial of either §1983 or Title VI claims. McDonald; Gardner-Denver; see supra p. 18. Caldeira could not put on evidence of the conspiracy because the Union--his adversary--controlled the proof. This was one of the very conflicts in arbitration about which Justice Brennan specifically warned about in McDonald [466 U.S. at 291]. Further, the arbitrator had no authority or jurisdic-

tion to consider section 1983 or award punitive damages, damages for emotional distres, or attorney's fees.

So it seems incontestable that, standing by itself, the arbitration hearing was not full or fair. The question, however, is whether this result is changed by state circuit Judge Hirano's confirmation order.

b. The "Hearings" In State Court.

Any determination of procedural fairness[17/] requires consideration of whether there was:

(1) notice;
(2) discovery;
(3) opportunity to be heard;
(4) an impartial judge;
(5) an opportunity to present evidence;
(6) an opportunity to cross-examine;
(7) a decision based on and supported by the evidence;
(8) jurisdiction to grant relief; and
(9) appellate review.

Certain of these factors are essential to procedural due process.[18/] If numerous of these factors are lacking, at the very

least the "quality, extensiveness, or fairness" of the proceeding may be called into question.

(1) Notice.

The County gave notice of its untimely motion to confirm the arbitration award. But notice must not only be given; it must be adequate--it must set forth the grounds on which relief is sought.[19/] Yet the County's motion gave no hint of the tolling doctrine on which the County relied at the hearing. When the notice given does not specify the grounds, a litigant is entitled to a continuance of hearing in order to prepare.[20/] Yet when Caldeira's counsel, surprised at the hearing by the County's tolling argument,asked for a continuance in order to brief the cases cited by the County in oral argument, Judge Hirano denied Caldeira's request. In these circumstan-

ces, Caldeira did not have adequate notice.

(2) Discovery.

This Court has intimated that lack of discovery may deprive the first judgment of "offensive collateral estoppel" effect for want of "full and fair" opportunity to litigate.[21] Before Judge Hirano, there could be no discovery, as the hearing was on motion and summary.[22]

(3) Opportunity for Hearing.

A number of decisions hold that where the "hearing" is summary, or preliminary, or suffers other limitations on scope, it may violate due process.[23] In this case the hearing before Judge Hirano was summary, as just indicated. It was also sharply circumscribed by Hawaii statute which placed limitations on what Judge Hirano could do. Pursuant to HAW. REV. STAT. §653-13 [APP. A p. xx], the "record" to be filed by the County with

its summary motion to confirm consisted only of

> "(1) The [collective bargaining] agreement...; and
> "(2) The award."

Following the filing of the motion and "record" (as thus defined), HAW. REV. STAT. § 658-8 then commanded that the judge

> [t]hereupon...shall grant such an order [of confirmation], unless the award is vacated, modified, or corrected, as prescribed in §§ 658-9 and 658-10. [Emphasis added].

At the time that the County's motion to confirm was filed, no vacation, modification, or correction was possible under these further Hawaii provisions.[24]. Thus Judge Hirano's hands were completely tied: unless he denied the motion as untimely, he was compelled by statute to grant it. In these circumstances, there was no opportunity for Caldeira to be heard, let alone have a "full" opportunity to

litigate.

(4) An Impartial Judge.

The requirement of an impartial judge is an essential element of procedural due process [see n. 18 supra]. Reasons exist to question Judge Hirano's impartiality, on which the Ninth Circuit made no comment whatsoever in its decision.[25/]

(5) Opportunity To Present Evidence.

Part and parcel of "opportunity for hearing," and essential to due process, is the opportunity to present evidence [see n. 18 supra]. Caldeira, after Judge Hirano confirmed the arbitration award, tried, on motion for reconsideration and to vacate, to present evidence. But reconsideration was limited to the tolling issue.[26/] All other issues (and supporting evidence) were time-barred because the Union had not

filed a motion to vacate within 10 days. Thus Judge Hirano could not consider the conspiracy evidence had he wanted to do so.

Caldeira also believes that, to a scrutinizing eye reviewing the transcript of the second hearing before Judge Hirano on reconsideration [APP. G], it is clear that Judge Hirano did not consider the conspiracy evidence. There is thus "reason to doubt" the "quality, extensiveness, and fairness" of the "hearings" before Judge Hirano, which totalled all of 45 minutes.

(6) Cross-Examination.

Likewise an essential element of due process is the opportunity to cross-examine witnesses [see n. 18 supra]. Caldeira had no such right before Judge Hirano as the confirmation hearing was summary.

(7) The Right To A Decision Based

On And Supported By The Evidence.

Minimal due process requires "...a decision based solely on the evidence...."[27/] Findings of fact and conclusions of law require a judge to hew to the evidence and the law and provide a basis for appellate review. Findings are especially apt in administrative proceedings.[28/] Yet Judge Hirano made no findings or conclusions. There was simply an order granting confirmation [APP. E] and an order denying the motions for reconsideration and to vacate [APP. H].

(8) Jurisdiction.

All authorities agree that Jurisdiction in the first proceeding to hear and determine the claim or cause being precluded in the second is essential to procedural due process.[29/] Over the years, the

decisions of this Court have consistently so held.

In 1965, this Court in Utah denied preclusive effect to a decision of the Board of Contract Appeals, observing that the Board "...had no jurisdiction to award monetary relief." [384 U.S. at 403]. In 1974 in Gardner-Denver, this Court noted that an arbitrator "...has no general authority to invoke public laws...." [415 U.S. at 53].

In 1980 in Thomas v. Washington Gas Light Co., 448 U.S. 261, this Court, in the plurality opinion of Justice Stevens, adopted the views expressed by Restatement §26(1)(c) [see n. 29 supra] in a slightly different context.[30/] In 1981 this Court in Barrentine v. Arkansas-Best Freight Systems, Inc. 450 U.S. 728 held that truck drivers who had lost their compensation claims in arbitration were not precluded from suing

in federal court under the Fair Labor Standards Act because their FLSA claims arose, not from the collective bargaining agreement, but "...out of a statute designed to provide minimum substantive guarantees to individual workers." Id., at 737.

Even more recently, in 1985, this Court, in Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 382-383, held that a state court dismissal for failure to state a cause of action under state law did not bar a later antitrust suit in federal court because the state court had no Sherman Act jurisdiction. This Court's decision was based on an application of state preclusion law which embraced the Restatement §26(c)(1) jurisdictional exception.

Accordingly, it seems well established that lack of jurisdiction--

including lack of power to order particular relief or grant a particular remedy--will defeat preclusion. A number of post-Kremer lower court decisions, including a number of Ninth Circuit decisions, so hold.[31/]

Neither the arbitrator nor Judge Hirano in state court had jurisdiction or power to adjudicate a section 1983 action, award punitive damages, award damages for emotional distress, or award attorney's fees. Therefore their decisions were not preclusive.

(9) Appellate Review.

Although appellate review is not essential to procedural due process,[32/] its absence may, together with other procedural deficiencies, violate due process.[33/]

In the present case, the Ninth Circuit stated that Caldeira was under the "mistaken belief" that he could not

appeal Judge Hirano's confirmation order [Caldeira, supra, 866 F. 2d 1175 at ___; APP B p. 699 n. 4]. But the Ninth Circuit did not explain why it disagreed with Caldeira's analysis of his appeal rights. Caldeira believes that Judge Hirano's order was not appealable and that the absence of appellate review is a factor to be considered in weighing whether the proceeding before Judge Hirano comported with procedural due process.

(10) "Full and Fair"--Fact Questions

In assessing the "fullness and fairness" of the proceedings both before the arbitrator and Judge Hirano, and in asking whether there is "reason" to question the "quality, extensiveness, or fairness" thereof, factual questions abound.[34/] The answers to these questions would determine whether the hearings which Judge Hirano gave Caldeira

were "full and fair." That they are factual questions suggests that discovery on such questions--litigation on such questions--is necessary in order to determine fullness and fairness, which in turn necessitates remand.[35]

2. There Was No Preclusion Because Caldeira's Section 1983 Claim Did Not Involve The "Same Issue" And Was A "Different Claim."

Res judicata bars a second suit on the "same" claim or cause of action[36] but not on a "different" claim of cause of action;[37] and issue preclusion bars a second suit on the "same issue" provided it was actually determined in the first suit.[38] To be "actually determined," it must be pleaded, denied, litigated, and ruled on by findings and must further be necessary to the decision.[39]

It is true that "claim" in modern parlance is broadly viewed to require

that a plaintiff present in one suit "...all the claims for relief that he may have arising out of the same transaction or occurrence,"[40] or thereafter be barred. Nonetheless the federal courts continue to treat Title VII and §1983 actions as "different," justifying denial of §1983 preclusion, although there are decisions *contra*. One such difference is want of subject matter jurisdiction in state proceedings, already discussed *supra*. Another difference is lack of remedy.[41] Still another is the inability to raise or litigate a given issue in the state proceeding.[42] Issues are characterized as "different" even though they stem from the same transaction or occurrence.[43] Or a difference in the evidence justifies denial of preclusion, particularly where the different evidence from one tribunal to another is *evidence of conspiracy*.[44]

A difference in legal capacities in which the defendants are sued warrants denial of preclusion,[45] --a doctrine especially apt in the present case.[46] Lack of expertise is also a difference leading to denial of preclusion,[47] as is the presence, in the second action, of a federal source of right.[48] All these differences may be found in the present case.

3. The State Court's Judgment Was Not "On The Merits."

Judge Hirano's "review" of the arbitration award was thrice limited. He was not permitted to review the arbitration award de novo. He was not allowed to apply standard appellate review to determine if the arbitrator had committed legal error or had made findings of fact which were clearly erroneous or unsupported by substantial evidence. He was not even allowed to review the award for

"fraud, corruption, or undue means," as the Union had allowed the 10 day time limit for vacation to expire.

These facts distinguish the present case from Kremer. There, a New York appellate court reviewed a state Appeal Board decision affirming a state administrative agency. By statute, the scope of appellate review was limited to determining whether the administrative agency's decision was arbitrary. This Court held that the appellate court's affirmance was preclusive because it was a determination that the cause was "meritless." 456 U.S. at 479-480, and n. 21

Professor Davis has trenchantly written of Kremer:

> ...the Supreme Court's [decision] is analytically faulty, and clearly so.
>
> * * * *
>
> ...[T]he Appellate Division was reviewing the Appeal Board, whose authority was limited to deciding whether the Appeal Board's decision was "arbitrary, capricious, or an

> abuse of discretion." The Appellate Division's decision was res judicata on the question whether the NYHRD's decision was arbitrary, for that was the only question it could decide, and it could not be res judicata on the question of discrimination, which it could not decide.
>
> K. DAVIS, ADMIN. LAW TREATISE, §21.5 at 65 (2d Ed. 1983).

Professor Davis' comments aside, it is apparent that in the present case, Judge Hirano's "review" of the arbitration decision is a significant further step removed from the limited judicial review of Kremer, as he could not even determine whether the arbitrator's award was arbitrary. If Judge Hirano could not consider whether the award was arbitrary, then he could not (and did not) consider the merits. And if he could not consider the merits, then his confirmation order was not "on the merits" and not preclusive.

4. Caldeira's §1983 Claim Comes Under Exceptions to Preclusion.

The Court has on several occasions indicated that as a matter of federal

common law[49/] there are exceptions to preclusion.[50/] To date, the most vigorous explication of exceptions to preclusion has come in Haring, where, in a unanimous opinion written by Justice Marshall, the Court, after noting the exception for proceedings which were not "full and fair," went on to state:

> Moreover, additional exceptions to collateral estoppel may be warranted in § 1983 actions in light of the "understanding of § 1983" that "the federal courts could step in where the state courts were unable or unwilling to protect federal rights." Ibid. Cf. Id., at 95, n 7, 66 L Ed 2d 308, 101 S Ct 411; Board of Regents v. Tomanino, 466 US 478, 485-486, 64 L Ed 2d 440, 100 S Ct 1790 (1980) (42 USC § 1988 [42 USCS § 1988] authorizes federal courts, in an action under § 1983, to disregard an otherwise applicable state rule of law if the state law is inconsistent with the federal policy underlying § 1983).

462 U.S. at 313-314. [51]

Thus federal courts may except state judgments from preclusive effect when:

(1) state courts are unable or unwilling to protect federal

rights;

(2) state rules of law are inconsistent with federal policy underlying section 1983;

(3) the litigant has not freely and without reservation submitted his federal claims to state court; and

(4) when required by "special circumstances" not yet defined.

The Restatement also sets forth exceptions to preclusion including one based on unfair conduct by the adversary.[52/] On present facts, there are several reasons to consider one or more of these exceptions.[53/]

5. State Preclusion Law: Caldeira Was Ignorant Of His §1983 Claim and Under Hawaii Law Was Not Precluded.

The Ninth Circuit correctly noted that "...to determine...preclusion..., this court must look to the law of the state in question." Caldeira, 866 F. 2d at 964; APP. A p. 964; see also Allen, 449 U.S. at 96; Haring, 462 U.S. at 313. Yet the Ninth Circuit then proceeded to

ignore an argument made by Caldeira that under Hawaii law as set forth in the Hawaii Supreme Court's decision in Bolte v. Aits, Inc., 60 Haw. 58, 62, 587 P.2d 810 (1978), there is no preclusion if in the first suit the claimant was ignorant of the rights which he later asserted in the second suit.[54/]

This rule exactly fits the case at bar. Caldeira knew that he had labor law rights; and following his discharge, he sought arbitration and filed his HPERB charges. But he did not know that he also had a §1983 claim based upon liberty and property interests in and constitutional rights to his job. Not until consultation with his counsel, well after the arbitration decision, did he learned that he had such rights [CR 80 (Declaration of Ronald Caldeira)]. Accordingly, under settled Hawaii law, the arbitration award as confirmed by the

"judgment" of Judge Hirano did not have bar or merger effect and did not preclude Caldeira's §1983 claims; and the Ninth Circuit failed in its §1738 charter to properly determine and apply Hawaii preclusion law.[55/]

C. NOTWITHSTANDING ANY FAILURE OF CALDEIRA'S §1985(3) CONSPIRACY CLAIM AGAINST THE UNION AND ITS OFFICIALS FOR LACK OF CLASS-BASED ANIMUS, THEY HAD LIABILITY BOTH UNDER COMMON LAW AND UNDER §1983, WHICH THE NINTH CIRCUIT FAILED TO RECOGNIZE.

Laying aside the propriety of the Ninth Circuit's dismissal of Caldeira's suit against the Union and its officials for failure to allege class-based animus without allowing Caldeira an opportunity to amend his pleadings,[56/] the Ninth Circuit absolutely ignored two alternative theories of the Union's liability--one under state law and one under federal law (and neither depending on class-based animus)--as if Caldeira had never argued them.

1. Joint Tortfeasor Liability.

Paragraphs 24 and 26 of the amended complaint [R. 23-25] allege that the Union officials "participated" in the County's wrongful acts and were

> ...jointly liable therefor, by reason of their participation in certain aspects thereof, encouragement thereof, and acquiescence therein.

Joint tortfeasors are those who act "in concert" to accomplish some common purpose or plan and whose concerted acts cause the harm.[57/] The Restatement of Torts describes joint tortfeasors as those acting "in concert" with others and also those who give "substantial assistance or encouragment" to others. 4 RESTATMENT (SECOND) OF TORTS, §§876, 877 (1977). There was ample evidence on which a fair-minded jury could find that the Union acted in concert with the County or gave assistance or encouragement to the County. Therefore the Ninth Circuit should be reversed and the case remanded

for determination of Caldeira's pendent state law joint liability claim against the Union and its officials.

2. Joint Statutory Liability with the County under §1983.

Finally, as Caldeira noted to Judge Fong at the time of oral argument [Tr.50-51], the Union and its officials may also be held directly liable under §1983--the same section under which Caldeira sues the County and its officials. Unlike §1985(3), §1983 requires no showing of class-based animus. Instead, all that is necessary, in the language of the statute itself, is a showing that the defendants acted "under color of state law."

There can, of course, be no question that the County, a political subdivision of the State of Hawaii, and the County officials named as defendants herein, were acting under color of state law.

But what of the Union and the Union officials? Here, it is very well established--by three decisions of this Court and a number of lower court decisions--that when a private party, such as the Union, joins a public party, such as the County, which acts under color of state law and violates §1983, the private party is likewise said to be acting under color of law and is also liable under §1983.[58/]

The Ninth Circuit absolutely ignored the authorities cited in the note, which were discussed at length by Caldeira in his reply brief.

Conclusion: Reasons Why This Court Should Grant Certiorari

§1983 is a statute which, according to its framers "...throws open the doors of the United States courts to whose whose rights under the Constitution are denied or impaired." Cong. Globe, 42nd

Cong., 1st Sess., 374-376 (1871), as quoted in Mitchum, 407 U.S. at 240. The preclusion decisions of this Court close those doors when a plaintiff has fully litigated his §1983 claim in state proceedings.

Yet it would be a mistake to read Kremer so broadly as to mean that the federal courts no longer have any responsibility for oversight of state tribunals. The preclusion decisions of this Court, particularly Haring, still require the federal courts to interpose themselves when state tribunals are either "unable or unwilling" to protect federal interests or do not provide a full or fair hearing for the consideration of those interests. Thus the federal courts must oversee state courts at least to the extent of discerning whether this is so.

In Congressional debates over the

enactment of §1983, Representative Perry intoned:

> "Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; * * * Among the most dangerous things an injured party can do is to appeal to justice."
>
> Cong. Globe, 42d Cong., 1st Sess., App. 78, as quoted in Mitchum at 240.

That "much has changed" since this statement was made does not guarantee that in every case the judicial system will produce justice. In this case, Caldeira has yet to receive justice--one "full and fair" judicial trial (both of those words are laden with meaning) of his conspiracy claim. He did not have it before the arbitrator, as the Union had exclusive control of the hearing. He did not have it before Judge Hirano, as the Hawaii statutes did not allow it. He did not have it before Judge Fong, as Judge Fong held himself precluded. And he did

not have it before HPERB, as HPERB likewise held itself precluded.

Not all injustice can be corrected via certiorari. In this case, however, the Court should grant certiorari for five reasons.

First, the Court can establish in §1983 cases the hitherto "undefined" scope of mimimal due process required for preclusion [Rule 17.1(c)].

Second, the Court can determine whether the question of "full and fair" is one of fact which itself must be litigated in federal court before a §1983 claim can be precluded [Rule 17.1(c)].

Third, the Court can resolve conflicts between the Ninth Circuit in this case and a number of other circuits over whether §1983 claims are "different" and not precluded by prior state proceedings [Rule 17.1(a)];

Fourth, the Court can put right the

failure of the Ninth Circuit to properly apply Hawaii preclusion law, which was its duty under §1738.

Fifth, the Court can also put right the failure of the Ninth Circuit to consider alternative theories of Union liability which do not depend on "class-based" animus.

For these reasons, petitioner asks that certiorari be granted.

DATED: June 2, 1989.

L. Richard Fried
Attorney for Petitioner
Ronald Caldeira

FOOTNOTES

1/ The District Court Clerk's Record is cited "CR"; the Excerpts of Record filed with the Ninth Circuit is cited "ER". Where materials forming part of the record on appeal to the Ninth Circuit are included in the appendices accompanying this petition, they are cited "APP".

2/ Caldeira, on September 16, 1987, made a formal submission of some 798 pages of documentary evidence [CR 69] together with a 27 page Trial Memorandum [CR 70, ER 31-57], included as Appendix M, reviewing the evidentiary facts of the 12 episodes of the conspiracy.

3/ The Union's Manlapit is not to be confused with Mayor Malapit.

4/ Pursuant to HAW. REV. STAT. §658-12 [APP.A p. xix], this constituted the "entry of judgment"; and pursuant to HAW. REV. STAT. §658-14 [APP. A p. xxi], this "judgment" had "... the same force and effect, in all respects as, and is subject to all of the provisions of law relating to, a judgment in an action; and it may be enforced, as if it had been rendered in an action in the court in which it is entered."

5/ Reconsideration was urged on three grounds: first, that the pending HPERB complaint tolled the one year statute only if completion of such administrative proceeding was a prerequisite to Caldeira's Civil Rights action [Id., pp. 3-4]--which was not the case as there was no exhaustion requirement; second, that the one-year filing period in HAW. REV. STAT. §658-8 was not a procedural statute of limitations but rather a jurisdictional condition on a substantive right which could not be tolled [Id., pp. 4-8]; and third, that the arbitration award should not be confirmed because it was procured by "corruption, fraud, or undue means" within the meaning of HAW. REV. STAT. §658-9(1) [Id., pp. 8-9].14/

6/ For a summary of Judge Fong's decision, see the Ninth Circuit's opinion herein, 866 F. 2d 1175 (9th Cir. 1989) [APP B].

7/ The collective bargaining agreement between the Union and the County [CR 76 (Ex. B to Ex. A)] sets forth the grievance procedure in Article 11 [Id., (pp. 6-8 of Ex. B to Ex. A)], which provides for arbitration as step 4 [loc. cit p. 7]. Article 11 then states: "The decision of the arbitrator shall be final and binding upon the Union, its members, the employees involved in the grievance, and the employer. There shall be no appeal from the arbitrator's decision by either party, if such decision is within the scope of the arbitrator's authority...." [loc. cit. p. 7]

8/ This statute [APP. A pp. xxi-xxii] states: "Unless the agreement for award provides that no appeal may be taken, an appeal may be taken from an order vacating an award, or from a judgment entered upon an award, as from an order or judgment in an action, otherwise no appeal may be had."

9/ For a list of some 21 cases decided by the Court since 1979, see Luneberg, The Opportunity to Be Heard and the Doctrines of Preclusion: Federal Limits on State Law, 31 VILLA. L. REV. 81 at 82-83 n. 4 (1986).

10/ Nichol, Federalism, State Courts, and Section 1983, 73 VA. L. REV. 959, 1000 (1987). See also Blackmun, J., disssenting in Allen, 449 U.S. at 424, and Kremer, 456 U.S. at 501-504. This is an opinion shared by other writers. See, e.g., M. SCHWARTZ AND J. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES, §9.10 p. 210 (1986) [hereafter "SCHWARTZ AND KIRKLIN"].

11/ For similar expressions of confidence in the state courts, see Kremer, 456 U.S. at 478; Allen, 449 U.S. at 105; Huffman v. Pursue, 420 U.S. 592, 599, 604 (1975) [reversing a district court injunction prohibiting enforcement of unconstitutional state statute "...in deference to...federalism...;" Younger v. Harris, 401 U.S. 37, 43-44 (1971) [same: emphasizing "'comity'" (defined as "...proper respect for state functions...") and "'Our Federalism'".

12/ Comment, Collateral Estoppel Effects of Administrative Agency Determinations: Where Should Federal Courts Draw the Line?, 73 CORNELL L. REV. 817, 821 (1988).

13/ McDonald, 466 U.S. at 292; see also Alexander v. Gardner-Denver Company, 415 U.S. 36, 56-57 (1974) [holding arbitration "...comparatively inferior to judicial processes in the protection of Title VII rights"].

14/ As stated in Goldsmith and Braveman, Rules of Preclusion and Challenges To Official Action; An Essay on Finality, Fairness, and Federalism, All Gone Awry, 39 SYR. L. REV. 599, 603 (1988): "A brief review of the distinction between 'issue preclusion' (sometimes referred to as collateral estoppel) and 'claim preclusion' (referred to as res judicata) is necessary....Issue preclusion bars relitigation of an 'issue' that was actually determined in a prior suit. * * * Under claim preclusion, a final judgment on the merits bars relitigation of the same 'claim,' including not only all issues that were actually determined, but also those issues that were not raised but could have been." See also 18 C. WRIGHT, A. MILLER, AND E. COOPER, FEDERAL PRACTICE AND PROCEDURE, §4402 at p. 7 (1981) [hereinafter cited "WRIGHT AND MILLER"]; 1B J. MOORE, J. LUCAS, AND T. CURRIER, MOORE'S FEDERAL PRACTICE, ¶0.401 at pp. 4-5 (2d Ed., 1987) [hereinafter cited "MOORE'S FEDERAL PRACTICE]; Allen, 449 U.S.

at 93; Migra, 465 U.S. at 547 n. 1; McDonald, 466 U.S. at 287 n.5.

15/ Allen, 449 U.S. at 105 [Blackmun, J., dissenting]; Goldsmith and Braveman, 39 SYR. L. REV., supra, 608.

16/ Nor has this Court mapped the contours of Kremer's and Montana's further injunction that there is no preclusion if "...there is reason to doubt the quality, extensiveness, or fairness of procedures followed in the prior litigation.

17/ See Luneberg, 31 VILLA. L. REV., supra, at 90; Friendly, "Some Kind of Hearing", 123 U. PA. L. REV. 1267, 1277-95 (1975). In Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979), this Court, dealing with offensive collateral estoppel, indicated that the benchmark for testing procedural due process should be the Federal Rules of Civil Procedure.

18/ At a minimum, procedural due process in judicial proceedings requires that there be a hearing at which the litigant can produce evidence and cross-examine adverse witnesses. Luneberg, 31 VILLA. L. REV., supra, 90; Note, 88 HARV L. REV. 1510 (1975); II R. ROTUNDA, J. NOWAK AND J. YOUNG, TREATISE ON CONSTITIONAL LAW, §17.8 (1986); 16 AM. JUR. 2d, Constitutional Law, §572 et seq. (1979). Due process also requires that the hearing be conducted by a fair and impartial judge. Tumey vs. Ohio, 273 U.S. 510 (1927) [judge had pecuniary interest]; Ward v. Village of Monroeville, 409 U.S. 57 (1972) [same]; Luneberg, supra, 31 VILLA. L. REV., 90; II R. ROTUNDA, J. NOWAK AND J. YOUNG, supra, §17.8; see also, Redish and Marshall, Adjudicatory Independence And The Values Of Procedural Due Process, 95 YALE L.J. 455, 475-491 (1986).

19/ Luneberg, 31 VILLA. L. REV., supra, 90. In Silver v. Queen's Hospital, 63 Haw. 430, 440, 629 P. 2d 1116 (1983), involving a hospital hearing at which a physician was denied staff privileges, the Hawaii Supreme Court said: "Timely and adequate notice must be given to the applicant, or to the physician whose staff privileges are sought to be revoked, and such notice must contain specific information regarding the grounds or charges upon which the hospital is relying to either deny or to revoke these privileges."

20/ SCHWARTZ AND KIRKLIN, supra, § 9.8 p. 206, citing Lee v. Winston, 717 F. 2d 1229 (6th Cir. 1983), aff'd on other grounds, 105 S. Ct. 1611 (1985) [criminal pre-trial proceeding; request for adjournment denied which gave defendant "insufficient time...to prepare...."]; Silver v. Queen's Hospital, supra, 63 Haw. at 440, 629 P. 2d at _____, in which the Hawaii Supreme Court said: "The physician must be provided every reasonable...opportunity to show that the grounds specified...are either inadequate or baseless...."

21/ Blonder-Tongue, supra, 402 U.S. 313, 332-3 (1971); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979); Standefer v. United States, 447 U.S. 10, 22 (1980) [defensive collateral estoppel].

22/ HAW. REV. STAT. §658-6 [APP. A p.] provides that applications for confirmation shall be "...made and heard in a summary way in the manner provided for the making and hearing of motions...."

23/ SCHWARTZ AND KIRKLIN, supra, § 9.8 p. 205, citing Whitley v. Seibel, 676 F. 2d 245 (7th Cir. 1982), cert. den. 459 U.S. 942 (1982) [summary criminal preliminary hearing with no right of appeal]; compare Coogan v. City of Wixom, 820

F. 2d 438 (4th Cir. 1987) ["Some preliminary hearings are little more than formalities" which will not be preclusive]; Thourner v. Meyer, 803 F. 2d 1093 (10th Cir. 1986) [1 day notice and 4 day total life of state court action]; cf. Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 526 (1931) [hearing to determine personal jurisdiction requires that parties be "fully" heard].

24/ Although HAW. REV. STAT. §658-9(1) [APP. A. p. xvi] permits vacation of award where procured by "corruption, fraud, or undue means", H.R.S. §658-11 requires that a motion to vacate be brought "within 10 days after the award is made and served" [APP. A pp. xviii-xix]. In Caldeira's case, no such motion was filed by the Union, which had exclusive control of the arbitration on Caldeira's behalf, within this 10-day time limit or at all. Thus, when the County moved for confirmation two and one-half years later, there was no defense to the motion on the merits.

25/ Judge Hirano committed clear legal error, which was not reviewable. He denied a reasonable request for continuance made by Caldeira at the first hearing so that Caldeira could brief the tolling issue. And, as indicated by the transcripts of hearing, he exhibited disrespect for Caldeira's legal position, giving it short shrift and ruling without any articulation of his decision.

26/ Judge Hirano, despite being furnished, now, with a legal memorandum exploding the County's tolling position, refused to change his mind.

27/ Luneberg, 31 VILLA. L. REV., supra, 90. In Silver, supra, 63 Haw. at 440-441, 629 P. 2d at ___, the Hawaii Supreme Court said: "The decision of the board must be in writing and any

denial or revocation may not stem from unreasonable, arbitrary, capricious, or discriminatory considerations. Its findings of fact must be supported by substantial evidence. Such evidence has been defined by the court to mean that quantum and quality of evidence which would warrant a reasonable man in reaching a conclusion. Shinn v. Yee, Ltd., 57 Haw. 215, 553 P. 2d 733 (1976)."

28/ See Silver, quoted n. 35 supra; Comment, 73 CORN. L. REV., supra, at 829-830, 848 [desirable agency procedures include "decision made on the evidence"], citing Parker v. Nat'l Corp.for Housing Partnership, 619 F. Supp 1061, 1065 (D.D.C. 1985) [required elements of agency procedure include findings and conclusions].

29/ RESTATEMENT (SECOND) OF JUDGMENTS, supra, §20(a) [prior judgment no bar "[w]hen the judgment is one of dismissal for lack of jurisdiction...."], §26(1)(c) [no improper splitting of cause of action when "...plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction"]; Morris, How Many Bites Are Enough? The Supreme Court's Decision in University of Tennessee v. Elliott, 55 TENN. L. REV. 205, 246 (1988) ["...collateral estoppel applies only if the prior tribunal had subject matter jurisdiction over the issues litigated before it."]; SCHWARTZ AND KIRKLIN, supra, 205-206 ["The most obvious example of lack of a full and fair opportunity is a state proceeding in which a federal constitutional claim may not be asserted. A determination in such a proceeding could not preclude the litigation of a constitutional claim in a federal court §1983 action."].

30/ There, this Court held that an award of disability benefits under the Virginia Workmen's Compensation Act could not preclude the claimant from later obtaining a supplemental award of benefits in the District of Columbia, because the Virginia Worker's Compensation Commission had no power to determine the extra-territorial effects of its decisions; and "...full faith and credit need not be given to determinations that it had no power to make [citing what is now Restatement §26(c)(1)]." Id., at 281-283. See Luneberg, 31 VILLA. L. REV., supra, at 168.

31/ Hirst v. California, 770 F. 2d 776, 778 (9th Cir. 1985) [federal courts have exclusive jurisdiction over Title VII claims, so state employment discrimination determination not claim preclusive, but issue preclusion applied]; Trujillo v. County of Santa Clara, 775 F. 2d 1359 (9th Cir. 1985) [same]; Norco Constr., Inc. v. King County, 801 F. 2d 1143 (9th Cir. 1986); Garrett v. City and County of San Francisco, 818 F. 2d 1515 (9th Cir. 1987) [same; but issue preclusion not applied because not clear that issue of disparate treatment was actually litigated in state court]; Healy v. Town of Pembroke Park, 831 F. 2d 989, 992 (11th Cir. 1987) [same; §1983; state employee relations agency had no jurisdiction or power to award compensatory damages]; Whitfield v. City of Knoxville, 756 F. 2d 455 (6th Cir. 1985) [same; action under ADEA; claim could not have been raised in earlier action]; Miller v. Hartwood Apartments, 689 F. 2d 1239 (5th Cir. 1982) [same; §1983]; Negin v. City of Mentor, 601 F. Supp 1502 (N.D. Ohio 1985) [same; §1983]; Bottini v. Sadore Mgt. Corp., 764 F. 2d 116 (2nd Cir. 1985) [same; Title VII].

Hawaii preclusion law is to the same effect: Silver, supra, 63 Haw. at 438, 629 P. 2d at ___; Hall v. State, 7 Haw. App. __, 756 P. 2d 1048, 1054 (1988).

32/ SCHWARTZ AND KIRKLIN, supra, § 9.8, p. 204, citing Jones v. Barnes, 103 S. Ct. 3308, 3312 (1983); Lindsey v. Normet, 405 U.S. 56, 77 (1972); Resnick, Precluding Appeals, 70 CORN. L. REV. 603, 607 (1985), citing Griffin v. Illinois, 351 U.S. 12, 18-20 (1956); but see RESTATEMENT (SECOND) OF JUDGMENTS, supra, §28(1).

33/ Compare Sherrer v. Sherrer, 334 U.S. 343, 348 (1948); RESTATEMENT (SECOND) OF JUDGMENTS, supra, §12(3) and comment e [preclusion to litigate jurisdictional issues]; Id. §28 [setting forth exceptions to preclusion generally and providing in subsection (1) that there is no preclusion if "[t]he party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action...."]; Standefer v. United States, supra, 447 U.S. 10, 22-24 (1980) [criminal prosecution; because of restrictive rules of evidence and lack of opportunity to appeal, it may be unfair to preclude previously litigated issues; in absence of review, underlying premise of issue preclusion--that correct result was reached--may be unwarranted].

34/ Did the arbitrator have any idea about the long-standing conspiracy? Did Judge Hirano? How much time did Judge Hirano spend (apart from the 45 minutes in court) in reviewing the submissions of the parties--particularly, Caldeira's conspiracy evidence? Did he make notes? Did he read the cases cited in Caldeira's motion to reconsider on the County's tolling doctrine? Did he do independent research? Did he have a law clerk? What did his law clerk conclude?

35/ This is not a fanciful suggestion. Justice Stevens, dissenting in Elliot, has also noted, 478 U.S. at ___, 106 S. Ct. at 3228, n. 1, that "...the §1983 claim may be litigated in

federal court, at least to the extent of determining whether the complainant was afforded a full and fair opportunity to litigate before the state administrative tribunal.***"

36/ 1B MOORE'S FEDERAL PRACTICE, supra, ¶ 0.410[1] pp. 348-349, ¶ 0.443[2] pp. 760-761; McDonald, 466 U.S. at 287, n.5.

37/ The merger aspect of res judicata or claim preclusion will also prevent a second suit on any claim which "could have" been raised in the first case even though it was not. SCHWARTZ AND KIRKLIN, supra, §9.2; Allen, 449 U.S. at 93; Silver, 65 Haw. at 435-36, 629 P. 2d at ____.

38/ See authorities cited in n. 44 supra.

39/ 1B MOORE'S FEDERAL PRACTICE, supra, ¶ 0.443[3], pp. 768-9; 2 J. COOK AND J. SOBIESKI, CIVIL RIGHTS ACTIONS, ¶3.22 at p. 3-216-2 (1988) [hereinafter "COOK AND SOBIESKI"]; Haring, 462 U.S. at 315.

40/ 1B MOORE'S FEDERAL PRACTICE, supra, ¶ 0.410[1] pp. 359-361, RESTATEMENT, supra, §24, Luneberg, 31 VILLA. L. REV., supra, 105-6.

41/ In addition to the cases cited n. 39 supra, see also Nilsen v. City of Moss Point, 674 F. 2d 379 (5th Cir. 1982), reversed en banc, 701 F. 2d 556 (5th Cir. 1983); Stafford v. Muscogee County Bd. of Educ., 688 F. 2d 1383 (11th Cir. 1982); Miller v. Hartwood Apts., 689 F. 2d 1239 (5th Cir. 1982); Kelly v. Warminster Township Bd. of Supervisors, 512 F. Supp. 658 (E.D.Pa. 1981), aff'd 681 F. 2d 806 (3rd Cir. 1982) [unpublished]; Washington V. City of Evanston, 535 F. Supp. 638 (N.D. Ill. 1982); Davidson v. Capuano, 792 F. 2d 275 (2d Cir. 1986) [unlikely damages could have been awarded in a state judicial review proceeding].

But see, contra, Punton v. City of Seattle, 805 F. 2d 1378 (9th Cir. 1986); Campbell v. City of Allen Park, 829 F. 2d 576 (6th Cir. 1987); Gregory v. Chehi, 843 F. 2d 111 (3d Cir. 1988).

42/ Two Ninth Circuit decisions so hold yet went uncited in Caldeira: Shaw v. California Dep't. of Alcoholic Beverage Control, 788 F. 2d 6070 (9th Cir. 1986); Shapely v. Nevada Bd. of State Prison Comm'rs, 766 F. 2d 404 (9th Cir. 1985) (per curiam) [both actions brought in federal court]. For decisions in other circuits, see Brown v. Edwards, 721 F. 2d 1442 (5th Cir. 1984); Smith v. Updegraff, 744 F. 2d 1354 (8th Cir. 1984); Jones v. City of Alton, 757 F. 2d 878 (7th Cir. 1985); McLaughlin v. Alban, 775 F. 2d 389 (D.C. Cir. 1985) (per curiam); McAdoo v. Lane, 564 F. Supp. 1215 (N.D. Ill. 1983), aff'd sub nom., McAdoo v. Thomas, 1774 F. 2d 1168 (7th Cir. 1985); Barnell v. Payne, Webber, Jackson & Curtis, Inc., 614 F. Supp. 373 (S.D.N.Y. 1985); Battle v. Isaac, 40 Fair Empl. Prac. Cas. (BNA 1664 (N.D. Ill. 1986).

43/ I.A. Durbin, Inc. v. Jefferson Nat'l Bank, 793 F. 2d 1541 (11th Cir. 1986) [issues not identical]; Drum v. Nasuti, 648 F. Supp. 888 (E.D.Pa. 1986), aff'd 831 F. 2d 286 (3d Cir. 1987) [same; unpublished opinion].

44/ Smith v. Updegraff, supra, 744 F. 2d 1354, 1361-1363 (8th Cir. 1984) [wrongful discharge; state administrative proceeding limited; federal action involved new evidence of conspiracy; both claim and issue preclusion denied]; compare Mack v. South Bay Beer Distribs., Inc., 798 F. 2d 1279 (9th Cir. 1986) [age discrimination; state court proceeding not adequate when record not clear that evidence was introduced on each issue]; and cf. the decision of this Court in FTC v. Motion Picture Advertising Service Co., 344 U.S. 392 (1952) [second prosecution for use of exclusive agreements not barred where first

case was based on conspiracy and second case was not]; contra, Flores v. Edinburg Consol. Ind. Sch. Dist., 741 F. 2d 1773 (5th Cir. 1984) [operative facts of second §1983 action in federal court were same as first state court tort action; plaintiff could have brought §1983 claims in state court]

45/ Headley v. Bacon, 838 F. 2d 1272, 1279 (8th Cir. 1987) [first Title VII suit against defendants in their official capacity does not preclude second §1983 suit against them in individual capacities]; Gregory v. Chehi, supra, 843 F. 2d 111 (3d Cir. 1988) [same]; but cf. Thurston v. United States, 810 F. 2d 438 (4th Cir. 19887) [Bivens action].

46/ Caldeira's arbitration, and Judge Hirano's confirmation thereof, involved only the Union and the County, whereas in his §1983 action, Caldeira sued not only the entities (the County and the Union) but also the officials of each, in both their official and individual capacities [see List of Parties, supra].

47/ Shaw v. California Dept. of Alcoholic Bev. Control, supra, 788 F. 2d 6070, 607-09 (9th Cir. 1986) [state alcohol board has expertise in enforcing liquor laws, not in making constitutional adjudications]; cf. McDonald: arbitrators "...do not have the expertise required to resolve the complex legal questions that arise in §1983 actions." [466 U.S. at 290].

48/ Brantley v. Surles, 718 F. 2d 1354 (5th Cir. 1983) [first action involved state property rights; second §1983 action involved federal constitutional privacy rights]; RESTATMENT, supra, §§86(1) and (2) [no bar if federal claim arises "...under scheme of federal remedies which contemplates that the federal claim may be asserted notwithstanding the adjudication in state court."]; but see 1B MOORE's FEDERAL PRACTICE,

supra, ¶0.410][1] at p. 363, noting that the Restatement was promulgated before Kremer and is "...seriously misleading."

49/ "...we have frequently fashioned federal common-law rules of preclusion in the absence of a governing statute [citations omitted]." Elliott, ___U.S. at ___, 106 S. Ct. at 3224.

50/ Montana, 440 U.S. at 155: ("...other special circumstances [may] warrant an exception to the normal rules of preclusion."); Allen, 449 U.S. at 101: (there might be "...an exception to res judicata and collateral estoppel where state law did not provide fair procedures....").

51/ In footnote 17, Justice Marshall referred to Montana and added that "other conditions" might exist for preclusion, including "special circumstances" as where, quoting Montana, a litigant has not """freely and without reservation submit[ted] his federal claims for decision by the state courts...and ha[d] them decided there...."' (quoting England v. Medical Examiners, 375 U.S. 411, 419...(1964))."

52/ The Restatement's list of RESTATEMENT, supra, §26-f [claim preclusion: exception for "extraordinary reason" such as "...failure of the prior litigation to yield a coherent disposition...."; §28(5)(c) [issue preclusion: exception when "...party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity...."]. As Moore notes, this is tantamount to an estoppel applied against the party seeking preclusion because of his unfair conduct. 1B MOORE'S FEDERAL PRACTICE, supra, ¶ 0.441[3.--3] at p. 739.

53/ First, Judge Hirano showed himself to be indifferent to federal rights, granting a

motion to confirm which was flagrantly out-of-time. Second, Caldeira did not choose to have his day in court in summary proceedings before Judge Hirano where he had no real opportunity to put on his case. Third, the County appears to have gained Judge Hirano's confirmation order by sharp practice--giving notice of motion which did not reveal its true grounds, and then citing theretofor uncited cases in oral argument which Caldeira was unprepared, without a continuance which he was denied, to rebut. Fourth, "special circumstances" exist warranting an exception to preclusion because Caldeira has never had a "full and fair opportunity" to litigate his conspiracy claim.

54/ There the Hawaii Supreme Court said: "We adhere to the rule adopted by the majority of jurisdictions that have dealt with the problem that a former recovery will not bar claims of which the plaintiff was ignorant, even if those claims existed at the time suit was commenced in the former recovery and could have been joined, unless plaintiff's ignorance was due to his own negligence [numerous citations of authority deleted]."

55/ See Haring, 462 U.S. at 314, n. 8.

56/ The Union argued for the first time in its answering brief in the Ninth Circuit that under United Brotherhood of Carpenters v. Scott, 463 U.S. 825, 834-35 (1983) and Griffin v. Breckenridge, 403 U.S. 88, 102 (1971), Caldeira's §1985(3) conspiracy case against the Union and its officials required that Caldeira plead and prove an "...invidiously discriminatory racial or class based animus...." Observing that Caldeira had not so alleged in his complaint, the Ninth Circuit then denied him leave to do so on remand (Caldeira averred in his reply brief that he could readily allege on remand that as a Portuguese, which was a protected class, he was dis-

criminated against by the Japanese County and Union officials). Caldeira, 866 F. 2d at 657-658, n. 5; APP B pp. 657-658.

57/ W. PROSSER AND P. KEETON, THE LAW OF TORTS, §46 at 322 (5th Ed. 1984); 3 F. HARPER, F. JAMES, AND O. GRAY, THE LAW OF TORTS, §10.1 at 12 (2d Ed. 1986).

58/ Dennis v. Sparks, 449 U.S. 24, 27-28 (1980); Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970); United States v. Price, 383 U.S. 787, 784 (1966). In Dennis, this Court said: "...to act 'under color of' state law for §1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. * * * Adickes v. S. H. Kress & Co., 398 U.S. 144, 152 (1970); United States v. Price, 383 U.S. 787, 794 (1966)..."

These cases were followed (although sometimes the rule was held inapplicable) in Green v. Francis, (6th Cir. 1983) 705 F. 2d 846, 850 [there was "sufficient nexus" between public officials and non-public officials]; Brinkmann v. Johnston, 793 F. 2d 111, 112 (5th Cir. 1986); Grameros v, Jewel Companies, Inc., 797 F. 2d 432, 435 (7th Cir. 1986); Malak v. Associated Physicians, Inc., 784 F. 2d 277 (7th Cir. 1986); and Storey v. United States, 629 F. Supp. 1174, 1176 (N.D. Miss. 1986). See generally 2 J. COOK AND J. SOBIESKI, CIVIL RIGHTS ACTIONS, supra, §7.11 at p. 7-44 (1986). The precursor of these decisions may have been Burton v. Wilmington Park Authority, 365 U.S. 715 (1961). There a private restaurant refused admission to blacks. Because the restaurant leased the situs of the restaurant from the state, it was held that the restaurant owner had "so far insinuated itself" into a position of "interdependence" as to be a "joint participant" with the state. Hence there was state action and a violation of substantive due process.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF HAWAII)
)
SS.
CITY AND COUNTY OF HONOLULU)

I, L. Richard Fried, being first duly sworn, depose on oath and state that I am a member of the Bar of the Supreme Court of the United States; and that on the 2nd day of June, 1989, a date within the time permitted, I served copies of the Petition for Writ of Certiorari on Respondents by causing copies to be mailed in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

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Subscribed and sworn to before me
this 2nd day of June, 1989.

Notary Public, State of Hawaii
My commission expires: 10/3/89
8967A